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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 DWIGHT PHILLIPS,) CASE NO. C06-1821-JLR
08)
09 Plaintiff,)
10)
11 v.) REPORT AND RECOMMENDATION
12) RE: SOCIAL SECURITY
MICHAEL J. ASTRUE,) DISABILITY APPEAL
Commissioner of Social Security)
Defendant.)
_____)

13 Plaintiff Dwight L. Phillips proceeds through counsel in his appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's applications for Supplemental Security Income (SSI) benefits after a hearing before an
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record
17 (AR), and all memoranda of record, it is recommended that this matter be REMANDED for
18 further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1956.¹ He has an eleventh grade education. Plaintiff

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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 previously worked as a cook.

02 Plaintiff applied for SSI in October 2001, alleging a disability onset date of March 15, 2001
03 due to a back condition and depression. His application was denied initially and on
04 reconsideration, and he timely requested a hearing. An initial hearing was held before an ALJ on
05 April 19, 2004, following which a decision was issued denying benefits. (AR 243-53.) Plaintiff
06 appealed and, in October 2004, reapplied for SSI. However, the administrative files were not
07 located and this Court remanded in order to allow the defendant to locate or reconstruct the
08 record and to make a determination of whether to award benefits. (*See* AR 254-55); *Phillips v.*
09 *Barnhart*, No. C05-1537-JCC-JPD (Dkt. 12).

10 Because the claim file and cassette tape of the hearing could not be located, the Appeals
11 Council vacated the prior decision and ordered a *de novo* hearing, together with any further
12 proceedings necessary to locate or reconstruct the record, and consolidated plaintiff's October
13 2001 and October 2004 SSI applications. (AR 256.) A second hearing was conducted by an ALJ
14 on February 25, 2006. (AR 597-639.) The ALJ issued a decision on October 23, 2006 denying
15 benefits. (AR 11-22.) Plaintiff appealed this final decision of the Commissioner to this Court.

16 JURISDICTION

17 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

18 DISCUSSION

19 The Commissioner follows a five-step sequential evaluation process for determining
20 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must

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22 official policy on privacy adopted by the Judicial Conference of the United States.

01 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
02 engaged in substantial gainful activity since his alleged onset date. At step two, it must be
03 determined whether a claimant suffers from a severe impairment. The ALJ found severe plaintiff's
04 mood disorder with psychotic features and a lumbar strain. Step three asks whether a claimant's
05 impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments, either
06 separately or in combination, did not meet or equal the criteria for any listed impairments. If a
07 claimant's impairments do not meet or equal a listing, the Commissioner must assess residual
08 functional capacity (RFC) and determine at step four whether the claimant has demonstrated an
09 inability to perform past relevant work. The ALJ found plaintiff unable to perform his past
10 relevant work. If a claimant demonstrates an inability to perform past relevant work, the burden
11 shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to
12 make an adjustment to work that exists in significant levels in the national economy. The ALJ
13 found plaintiff could perform the jobs of dishwasher and laundry worker.

14 This Court's review of the ALJ's decision is limited to whether the decision is in
15 accordance with the law and the findings supported by substantial evidence in the record as a
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
17 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
18 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
19 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
20 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
21 2002).

22 Plaintiff argues that the ALJ's assessment of his RFC is not supported by substantial

01 evidence because she failed to properly evaluate the opinion of examining physician Dr. Heilbrunn.
02 Furthermore, plaintiff contends that the ALJ's step five finding was not supported by substantial
03 evidence because the hypothetical upon which the vocational expert (VE) based his opinion did
04 not include the plaintiff's borderline intellectual functioning. In response, defendant urges
05 affirmance, arguing that it was within the province of the ALJ to choose the physician's opinion
06 upon which to rely, and that the hypothetical posed by the ALJ properly included all limitations
07 found to be supported by substantial evidence.

08 Opinion of Dr. Heilbrunn

09 Plaintiff notes that the opinion of examining state agency physician Dr. Heilbrunn as to
10 plaintiff's physical capacity is not consistent with the functional capacity assessed by the ALJ.
11 Plaintiff does not dispute that the ALJ is responsible for resolving conflicts in the medical
12 evidence. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). However, plaintiff argues
13 that the ALJ must explicitly evaluate those opinions, providing clear and convincing reasons for
14 rejecting the uncontradicted opinion of either a treating or examining physician, and specific and
15 legitimate reasons supported by substantial evidence in the record for rejecting the opinion if
16 contradicted by another doctor. *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995). The
17 Commissioner argues that the ALJ's decision summarized all medical opinions of record, including
18 those of Dr. Heilbrunn, and provided the requisite specific and legitimate reasons for finding in
19 favor of one physician instead of another. In reply, plaintiff points out that the specific and
20 legitimate reasons suggested by the Commissioner were not, in fact, reasons advanced by the ALJ.

21 The Commissioner correctly notes that the ALJ made mention of Dr. Heilbrunn's
22 examination of plaintiff:

01 On the same day as his hospitalization the claimant underwent a physical evaluation
02 from Dr. Heilbrunn. The claimant had normal gait and movement. He sat comfortably
03 during the entire interview and had a normal affect and eye contact. He was an
04 excellent historian and did not appear depressed. He was understandably concerned
05 about the deaths in his family. Dr. Heilbrunn diagnosed the claimant with lumbar
06 muscle strain.

07 (AR 13; internal citations omitted.) However, the ALJ does not discuss or otherwise acknowledge
08 Dr. Heilbrunn's functional assessment (AR 130) which, if credited, would restrict plaintiff to work
09 performed at levels below the "medium" work level which the ALJ found plaintiff capable of
10 performing. Instead, the ALJ credits the report of non-examining state agency doctors who
11 completed the type of "check-the-box" form that is typically given less weight. (AR 14, 198-203);
12 *Tidwell v. Apfel*, 161 F.3d 599, 602 (9th Cir. 1998).

13 Although the ALJ need not discuss all evidence presented, she must explain why
14 "significant probative evidence has been rejected." *Vincent v Heckler*, 739 F.2d 1393, 1394-95
15 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)). The findings must
16 be sufficiently detailed "to permit courts to review those decisions intelligently." *Id.* at 1394
17 (citing *Lewin v. Schwieker*, 654 F.2d 631, 634 (9th Cir. 1981)).

18 The Commissioner suggests that evidence of the ALJ's consideration of Dr. Heilbrunn's
19 opinion can be found in the comment that: "Interestingly the only person who has felt that the
20 claimant was a good historian was the person who did the physical examination of the claimant."
21 (AR 19.) This suggestion is unavailing, however, as the comment is made by the ALJ in
22 connection with plaintiff's mental impairments, not his physical capacity. Furthermore, despite
the Commissioner's argument that we should review other portions of the ALJ's decision to
construe the ALJ's consideration of Dr. Heilbrunn's opinion, "we cannot affirm the decision of

01 an agency on a ground that the agency did not invoke in making its decision.” *Stout v.*
02 *Commissioner*, 454 F.3d 1050, 1054 (9th Cir. 2006) (citing *Pinto v. Massanari*, 249 F.3d 840,
03 847 (9th Cir. 2001) (citing *SEC v. Chenery Corp.* 332 U.S. 194, 196 (1947))). Nor is this a case
04 in which the omission could be considered harmless error, since the ALJ provided no analysis
05 which would explain the crediting of the opinions of the reviewing physicians over that of
06 examining physician Dr. Heilbrunn.

07 Given the above, this case should be remanded to allow the ALJ to properly evaluate the
08 opinions of Dr. Heilbrunn.

09 Hypothetical Question Posed to VE

10 Plaintiff also contends that the hypothetical posed to the VE was incomplete because it
11 failed to include the plaintiff’s borderline intellectual functioning. The Commissioner argues that
12 the ALJ need only include the limitations found to be supported by substantial evidence, and that
13 the hypothetical was sufficient. Further, the Commissioner contends that plaintiff has not shown
14 that any accommodations relevant to this limitation were not included in the ALJ’s functional
15 capacity finding.

16 The ALJ’s decision shows that she was aware of the opinions of those doctors who
17 identified plaintiff’s borderline intellectual functioning. (*See* AR 14, 15). The ALJ’s functional
18 capacity finding shows some consideration of problems with intellectual functioning: “While his
19 intellectual functioning is not clear, he does have some apparent problems in concentration. He
20 can prepare his own food and follow simple instruction, so I find that he has moderate limitations
21 in concentration, persistence and pace.” (AR 19.)

22 Plaintiff argues that borderline intellectual functioning is a limitation on its own and must

01 be specifically considered as such by the VE, citing the Eighth Circuit case of *Lucy v. Chater*, 113
02 F.3d 905 (8th Cir. 1997). However, in that case, the ALJ failed to limit the claimant to work that
03 required following simple directions, instead erroneously finding the claimant capable of
04 performing the full range of sedentary work, some of which requires a higher level of mental
05 capacity. *Id.* at 909. Here, the ALJ's RFC finding, provided to the VE in the form of a
06 hypothetical, adequately addressed any vocational limitations that plaintiff's level of intellectual
07 functioning would require and, in fact, included the limitation to simple directions that was omitted
08 by the ALJ in *Lucy*. As such, plaintiff fails to demonstrate error with regard to the ALJ's step five
09 finding. However, if the ALJ's reconsideration of Dr. Heilbrunn's opinions changes the functional
10 capacity finding, it may be necessary for the ALJ to also reconsider the step five finding as well,
11 obtaining additional VE testimony if necessary.

12 CONCLUSION

13 For the reasons described above, this matter should be REMANDED for further
14 administrative proceedings consistent with this decision. A proposed order accompanies this
15 Report and Recommendation

16 DATED this 26th day of July, 2007.

17 

18 Mary Alice Theiler
19 United States Magistrate Judge
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